Prajakta Vartak

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3801 OF 2022

M/s. Global Aviation Services Pvt. Ltd. ..Petitioner
Vs.
Union of India & Ors. ..Respondents

Mr. V. Raghuraman, Senior Advocate with Mr. Shailesh Sheth and Mr. P. K. Shetty for Petitioner.
Mr. Jitendra Mishra with Ms. Sangeeta Yadav and Mr. Ashutosh Mishra for Respondents.

CORAM : G. S. KULKARNI &
JITENDRA S. JAIN, JJ.
DATE : JUNE 26, 2023

Oral Judgment (per G.S. Kulkarni, J.) :-

1. Rule. Rule made returnable forthwith. Respondents waive service. By consent of the parties heard finally.

2. By this petition filed under Section 226 of the Constitution of India, the petitioner has prayed for the following substantive reliefs:-

> "a) that this Hon'ble Court may issue a writ of certiorari or any other appropriate writ or order to quash the demand of service tax made vide impugned Order-in-Original No. MUM.SOUTH/CGST/Pr. Commr-09 to 11/2019-20 Dated 29.05.2019 issued by Respondent No. 2 enclosed in Exhibit A and any action taken pursuant thereto as violative of Articles 14, 19, and 265 being unreasonable, discriminatory, arbitrary, oppressive, excessive, premeditated and without the authority of law;

b) that this Hon'ble Court be pleased to issue a writ of Declaration or any other appropriate Writ, order or direction in the nature of Writ of Declaration to declare that the provisions of Section 174 of Central Goods and Services Tax Act 2017 (Exhibit B) as ultra vires the Constitutional (101st) Amendment Act, 2016, being legislative incompetent and violative of Article 14/19/265 of the Constitution.

c) that this Hon'ble court be pleased to issue a writ of certiorari or a writ of Declaration or any other appropriate writ or order to quash Notification No. 14/ 2017-CE(NT) dated 09.06.2017 and Order No. 2/2019(CGST & CX) dated 16.05.2019 (collectively enclosed as Exhibit 'D') as ultra vires the provisions of Section 3 of CGST Act, 2017 as also violative of Article 14/19 of the Constitution.

d) that this Hon'ble court be pleased to issue a writ of certiorari or a writ of Declaration or any other appropriate writ or order to quash Notification No. 2/2017-CT, dated 19.06.2017 (enclosed as Exhibit 'E') as ultra vires the provisions of Section 3 of CGST Act, 2017.

e) that this Hon'ble Court be pleased to issue a writ of Declaration or any other appropriate Writ, order or direction in the nature of a Writ of Declaration to declare that the provisions of Section 35F of Central Excise Act, 1944 (Exhibit F) as being manifestly arbitrary and violative of Article 14/19 of the Constitution.

f) that, pending decision of this petition, such ad-interim and/or interim order may be passed by this Hon'ble Court staying the operation of the impugned order vide Order-in-Original No.MUM.SOUTH/CGST/Pr. Commr- 09 to 11/2019-20 Dated 29.05.2019 issued by Respondent No.2 (enclosed in Exhibit A), and any other letter/notice issued pursuant thereto and direct the officers not to take any coercive action pending disposal of this writ petition;"

3. On 12 October, 2007, the petitioner was registered as service provider of Cargo Handling Services with erstwhile Service Tax-II Commissionerate and was assigned a registration number. On 15 October, 2015, first show cause notice for the period 2010-11 to 2013-14 demanding service tax of Rs. 3,68,22,353 was issued by respondent no.2-Principal Commissioner of CGST & CE, Palghar Commissionerate. The petitioner replied to the show cause notice by its reply dated 15 January, 2016. It appears that the second show cause notice dated 12 April, 2016 was issued to the petitioner for the subsequent period i.e. 2014-15 demanding service tax of Rs. 2,72,67,798/-. This show cause notice was also replied by the petitioner on 03 May, 2016. Pending the consideration of the petitioner's replies to both show cause notices, a third show cause notice came to be issued to the petitioner on 14 October, 2017 for the period 2015-16 demanding service tax of Rs. 2,86,49,432/- which was also replied by the petitioner by its reply dated 20 December, 2017.

4. It appears from the record that common hearing was granted to the petitioner in respect of the first two show causes notices by respondent no.3-Commissioner of CGST, Mumbai South Commissionerate. However, before an order could be passed by such officer, the Chief Commissioner of CGST & Central Excise, Mumbai Zone-respondent no.5 passed an order dated 16 May, 2019 assigning the adjudication of the show cause notices to respondent no.2- Principal Commissioner of CGST

& CE, Palghar Commissionerate, as per the provisions of Section 37A of the Central Excise Act read with Section 83 of the Finance Act, 1994 as also Notification No. 14/2017-CE(NT) dated 09.06.2017. It is stated that respondent no.5-Chief Commissioner of CGST & Central Excise, Mumbai Zone assigned the adjudication of the show cause notices to respondent no.2 for the reason that earlier officer who heard the petitioner was promoted as Principal Commissioner, CGST.

5. It appears that on 23 May, 2019 the petitioner filed additional written submissions before respondent no.3, however, oblivious of the fact that the proceedings were in fact assigned to respondent no.2 to adjudicate and pass final orders on the show cause notices. The petitioner thus contends that the additional written submissions in respect of all the three notices were not before respondent no.2 in passing the final orders. By the impugned order-in-original dated 29 May, 2019 passed by respondent no.2-Principal Commissioner, the demands as made in all three show cause notices were confirmed.

6. The petitioner has contended that respondent no.2 merely on the basis of TDS data received from the Income Tax Department, has held that service tax as demanded was leviable as the petitioner had made entries in the profit and loss account under the head "Retention of Freight", which were in the nature of service charges, for services provided by the petitioner to its client for transportation of goods by the airlines, and that, such services were in the nature of Business Auxiliary Services prior to 2012 and was a service after 2012 and accordingly, was liable for levy of service tax.

7. Mr. Raghuraman, learned senior counsel for the petitioner has fairly stated that the orders passed by respondent no.2 are appealable orders, he would, however, submit that an exception is required to be made in the present proceedings, so as to not relegate the petitioner to an appellate remedy, as according to him, there was a patent breach of principles of natural justice in passing the impugned order. It is submitted that respondent no.2 in passing the impugned order-in-original has failed to consider the additional written submissions as filed by the petitioner with respondent no.3, which was under a mistaken belief, that it is respondent no.3 who is the adjudicating authority, who would be passing the final orders on the show cause notices. It is submitted that it is imperative that an approach of holistic consideration on all the issues be adopted in passing the impugned order as respondent no.2 has not taken into consideration the position in law as clearly laid down in the decision of the tribunal, which was binding on respondent no.2 which was to the effect that the levy of service tax on retention of freight would be without authority of law, considering the fact that the notional surplus was earned from purchases and sale of space, and not by acting for a client who had a space or slot on a vessel, so as to fall within the purview of Section 65(19) of Finance Act, 1994. In support of such contention, it is submitted that the issue stands covered by the decision of the tribunal in case of ***EMU Lines Pvt. Ltd. Versus Commissioner of CGST and Central Excise, Belapur***[1] wherein, in a similar situation, as in the present case, the tribunal, following its decision in the case of ***Greenwich Meridian Logistics (I) Pvt. Ltd.***[2], has held that the issue was squarely covered by the said decision, and accordingly set aside the adjudication order by allowing the appeal. The observations, as made by the tribunal referring to the case of *Greenwich Meridian Logistics (I) Pvt. Ltd.* (supra) are required to be noted which read thus:-

> "4.6 In the case of Greenwich Meridian Logistics (I) Pvt. Ltd. [2016 (43) STR 215 (Tri.-Mumbai), the Tribunal has specifically observed as follows:-
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> > 11. Slots may be contracted for by the shipper or its agent with the shipping line through the steamer agent. Implicit is a uni-directional flow of consideration because the space belongs to the shipping line. Steamer agent or agent of shipper may earn

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2 2016 (43) STR 215 (Tri.-Mumbai)

commission in such a transaction. Leaving that situation aside, the contention of the appellant is that it is a 'multi-modal transport operator' which entails a statutorily assigned role in cross-order logistics. According to section 2 of the Multi-modal Transportation of Goods Act, 1993

(m) "multimodal transport operator" means any person who-

(i) concludes a multimodal transport contract on his own behalf or through another person acting on his behalf;

(ii) acts as principal, and not as an agent either of the consignor, or consignee or of the carrier participating in the multimodal transportation, and who assumes responsibility for the performance of the said contract; and

(iii) is registered under sub-section (3) of section 4.

(a) "carrier" means a person who performs or undertakes to perform for a hire, the carriage or part thereof, of goods by road, rail, inland waterways, sea or air;

12. The appellant takes responsibility for safety of goods and issues a document of title which is a multi-modal bill of lading and commits to delivery at the consignee's end. To ensure such safe delivery, appellant contracts with carriers, by land, sea or air, without diluting its contractual responsibility to the consignor. Such contracting does not involve a transaction between the shipper and the carrier and the shipper is not privy to the minutiae of such contract for carriage. The appellant often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. Such a contract forecloses the allotment of such space by the shipping line or steamer agent with the risk of non-usage of the procured space devolving on the appellant. By no stretch is this assumption of risk within the scope of agency function. Ergo, it is nothing but a principal-to-principal transaction and the freight charges are consideration for space procured from shipping line. Correspondingly, allotment of procured space to shippers at negotiated rates within the total consideration in a multi-modal transportation contract with a consignor is another distinct principal-to-principal transaction. We, therefore, find that freight is paid to the shipping line and freight is collected from client-shippers in two independent transactions..

13. The notional surplus earned thereby arises from purchases and sale of space and not by acting for a client who has space or slot on a vessel. Section 65(19) of Finance Act, 1994 will not address these independent principal-to-principal transactions of the appellant and, with the space so purchased being allocable only by the appellant, the shipping line fails in description as client whose services are promoted or marketed."

> 5.1 As we find the issue is squarely covered by the above two decisions, we do not find merit in the impugned order.
> 5.2 The impugned order is set aside and the appeal allowed."

8. Our attention is also drawn by Mr. Raghuraman to a recent order dated 27 February, 2023 passed by the Supreme Court confirming the decision of the tribunal in the case of *EMU Lines Pvt. Ltd.* namely in the case of ***Commissioner of CGST And Central Excise, Belapur*** in ***Civil Appeal No. 1479 of 2023*** dismissing the revenue's appeal. Mr.Raghuraman, would thus submit that the petitioner should not be called upon to avail of the alternate remedy of an appeal, to be filed before the tribunal, as in the peculiar facts and circumstances of the case, it would be appropriate that respondent no.2 namely the adjudicating authority needs to apply its mind to all the issues, including the additional written submissions dated 23 May, 2019, so that there would be a meaningful and appropriate adjudication of the show cause notices as per law. He would, therefore, submit that the petition be accordingly allowed in such terms.

9. On the other hand, Mr. Mishra, learned counsel for the revenue would not dispute that the additional written submissions as filed on behalf of the petitioner were not taken into consideration in passing the impugned orders and more particularly in view of assigning of the proceedings to respondent no.2. Mr. Mishra would also not have any counter contention against the proposition as canvassed on behalf of the petitioner relying on the decision of the tribunal in case of *EMU Lines Pvt. Ltd.* (supra) as also confirmed by the Supreme Court. He, however, contends that all these issues can be taken into consideration if the petitioner is made to avail of the remedy of an appeal, as the statute would mandate.

10. We have heard learned counsel for the parties and with their assistance, we have also perused the record and the decisions as cited on behalf of the petitioner.

11. It appears to be quite peculiar that initially the adjudication of the show cause notices was taken up by respondent no.3, however, in view of the order passed by respondent no.5, the same was transferred/assigned to respondent no.2, as the incumbent who was earlier holding the post of respondent no.3-Commissioner of CGST, during the pendency of adjudication of the show cause notices, was promoted to the post of Principal Commissioner. It also appears that the additional written submissions, which were quite material on law and facts, were in fact placed on record by the petitioner inadvertently before respondent no.3, hence, the same could not be taken into consideration by respondent no.2 when he passed the impugned orders. Thus certainly on such premise, there was a prejudice which was suffered by the petitioner in non-consideration of such submissions. Any breach of the principles of natural justice would be required to be attributed as an incurable defect qua the impugned order.

12. This apart, in our opinion, it would be appropriate in the facts and circumstances of the present case that respondent no.2 takes a holistic view of the matter considering the decision of the tribunal in *EMU Lines Pvt. Ltd. vs. Commissioner of CGST and Central Excise, Belapur* (supra), which considers a prior decision of the tribunal in *Greenwich Meridian Logistics (I) Pvt. Ltd.* (supra). On a perusal of the impugned order, it appears that such decision has not been considered. It is also quite pertinent as contended on behalf of the petitioner that the decision of the tribunal in *EMU Lines Pvt. Ltd. vs. Commissioner of CGST and Central Excise, Belapur* (supra) was confirmed by the Supreme Court in its order dated 27 February, 2023 on Civil Appeal No. 1479 of 2023 (supra).

13. In the above peculiar circumstances and considering the interest of justice, we are of the opinion that respondent no.2 needs to hear the petitioner afresh on the show cause notices, and after taking into consideration the facts of the case and the position in law as sought to be canvassed by the petitioner and the additional written submissions as made by the petitioner and/or any fresh submission, if the petitioner intends to file in compliance of the principles of natural justice, pass a fresh order adjudicating the show cause notices.

14. In the circumstances, the impugned order dated 29 May, 2019 passed by respondent no.2 is required to be quashed and set aside relegating the petitioner to the jurisdictional Commissioner as may be intimated by the respondents to the petitioner at least two weeks in advance, for an appropriate order to be passed in accordance with law. All contentions of the petitioner, as also of the revenue on all issues are expressly kept open.

15. In the peculiar facts of the present case, we would expect the Commissioner to hear the petitioner as expeditiously as possible and pass an appropriate order within a period of 10 weeks from today.

16. Disposed of in the aforesaid terms. No costs.

[JITENDRA S. JAIN, J.] **[G. S. KULKARNI, J.]**

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26 June, 2023